BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The majority and dissenting opinions below are at R. P. 54 , and are reported in 139 Fed. (2nd) 989. The opinion of the District Court has not been officially reported, and is at R. 121.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 [28 U. S. C. §347(a)]. The Order of the Circuit Court of Appeals for the Second Circuit, affirming the judgment of the District Court, was entered December 16, 1943 (R. P. 63).

Statutes Involved

The statutes involved are the New York Town Law (L. 1909, Ch. 63, as amended; L. 1932, Ch. 634, as amended) and the New York Public Officers Law (L. 1909, Ch. 51, as amended). The pertinent parts of these statutes and subsequent amendments thereto, are set forth in a comparative form in the Appendix.

Specifications of Errors to be Urged

(1) The Circuit Court of Appeals erroneously decided that the Town Board's designation of The Pelham National Bank as one of the three depositaries, in any or all of which the Supervisor might choose to put and keep the Town funds received by him, modified the absolute and continuing liability of the Town Supervisor to pay over and account for all funds coming into his hands as Supervisor, and that such action relieved the Town Supervisor and the surety on his official undertaking of all liability and responsibility for the loss of Town funds resulting from the failure and insolvency of The Pelham National Bank.

(2) The Circuit Court of Appeals erroneously decided that the Town is not entitled to recover from the Surety Company, as surety on the official undertaking of the Town Supervisor, for the loss of the Town funds resulting from the failure and insolvency of The Pelham National Bank.

(3) The Circuit Court of Appeals erroneously decided that the Surety Company, as the surety on the official undertaking of the Town Supervisor, is not liable to the Town, according to the terms of the bond and the statute, for all of the Town's costs and expenses resulting from the failure of the Town Supervisor to pay over and account for all funds coming into his hands as Supervisor, including litigation costs and other legal expenses of the Town.

ARGUMENT

I

The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with the applicable local decisions of the highest Court of law of the State

That the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions as well as the basic policy of the State of New York, is apparent from the Opinion of Judge Swan below (R. P.60). It long has been, and still is, the settled law of New York that its public officers are liable absolutely to account for and pay over all of the funds which come into their hands by virtue of their office. The sole exceptions are losses occasioned by acts of God or public enemies, or situations where the Legislature has *expressly* relieved the public officer from liability and provided another method for assuring against loss of public funds.

The amount of money here involved may not be large, in comparison with the sums sometimes in the public mind; but the amount here involved is important for this small Town, its taxpayers, and its small amount of Town funds; and the whittling away of a historic concept of the liability of a public officer is important to all units of local government.

In the latest expression of the New York State Court of Appeals on the subject, *Bird* v. *McGoldrick*, 277 N. Y. 492, Chief Judge Lehman specifically admonished that the Courts should not abrogate or limit the State's rule of absolute liability, saying (page 499):

> "Changing judicial views of public policy are an insecure basis for the extension or limitation of established rules of liability or for the rejection of a common law rule of liability and the formulation of a new rule. The judicial rule of liability, without fault, for the loss of public funds received by an officer, even if unduly harsh, is too well established to be changed by the Courts. It is for the Legislature, not the Courts, to change or limit the rule if such change seems wise. * * *"

The majority in the Court below disregarded, in the instant case, the statutory and decisional law of the State that such public officers are in effect insurers of public funds collected from taxpayers and intended for public uses. Such public officers and the sureties upon their bonds and undertakings are liable, without regard to their personal fault, for the loss of such funds. Only at their own risk and peril may they fail to take such steps as they are authorized to take for their own protection and that of the taxpayers. *Unless explicitly relieved by statute,* their liability for the funds received by virtue of their office is and remains absolute, outright, and admits of no excuse. Leading cases, significant because of the span of years which they cover, include:

Tillinghast v. *Merrill,* 151 N. Y. 135 (1896)—Supervisor of Town of Madison—Bank failure;

Yawger v. *American Surety Co.,* 212 N. Y. 292 (1914)—Supervisor of Town in Illinois under similar statute—Bank failure;

Village of Bath v. *McBride,* 219 N. Y. 92 (1916)—Village Treasurer—Bank failure;

Bird v. *McGoldrick,* 277 N. Y. 492 (1938)—Clerk of Municipal Court—liable for defalcations of subordinate appointed by others but in charge of funds;

Stanelevitz v. *City of New York,* 15 N. Y. Supp. (2d) 837 (1939)—Chamberlain of City of New York—liable for acts of subordinates appointed by others but in charge of funds.

In the oft-cited case of *Tillinghast* v. *Merrill, supra,* the New York Court of Appeals, *per* Bartlett, J., stated the reason and basis for the State's rule of strict liability (151 N. Y. at page 142):

> "In the case of an officer disbursing the public moneys much may be said in favor of limiting his liability where he acts in good faith and without negligence, and a strong argument can be framed against the great injustice of compelling him to respond for money stolen or lost while he is in the exercise of the highest degree of care and engaged in the conscientious discharge of duty. When considering this side of the case it shocks the sense of justice that the public official should be held to any greater liability than the old rule of the common law which exacted proof of misconduct or neglect.
>
> "It is at this point, however, that the question of public policy presents, and it may well be asked whether it is not wiser to subject the custodian of the public moneys to the strictest liability, rather than open the door for the perpetration of fraud in numberless ways impossible of detection, thereby placing in jeopardy the enormous amount of the public funds constantly passing through the hands of disbursing agents.

> "Without regard to decisions outside of our own jurisdiction, we think the weight of the argument, treating this as an original question, is in favor of the rule of strict liability which requires a public official to assume all risks of loss and imposes upon him the duty to account as a debtor for the funds in his custody."

In *Yawger* v. *American Surety Co., supra,* Judge Cardozo, writing for an unanimous Court, stated the New York law as to a Supervisor in the following explicit terms (212 N. Y. at page 297):

> "It is important to bear in mind the nature of a public officer's liability for public moneys received by virtue of his office. His liability does not grow out of negligence. *It is absolute, admitting of no excuse,* except perhaps the act of God or the public enemy. (*Tillinghast* v. *Merrill,* 151 N. Y. 135, 142; *Smythe* v. *U. S.,* 188 U. S. 156.) If he puts the money in a safe and burglars break open the safe and steal the money, he is liable. *If he puts it in a bank, and the bank loses it, he is liable.*" (Italics supplied)

Judge Cardozo did *not* say—indeed no New York case passing directly upon the question of liability of public officers charged with the care and custody of public funds has ever said, either before or after 1916—that

> If he (the Supervisor or other public officer) puts the public funds in a bank, and the bank loses it, he is liable unless the bank was one of the depositaries which some one else had designated, under statutory authorization, as those which he might use.

On the contrary, the New York rule has been and is that the Supervisor or other public officer is not relieved from his liability by indirection or implication, but is liable for the loss of public funds so deposited, *unless and until his liability is expressly modified or limited by the Legislature.* In several of the decided cases, as recently as 1938 and 1939, the public officer charged with the "care and custody" of public funds was held liable for their loss, even though

they were actually placed in the possession of some one whom he did not appoint or select for that purpose.

The New York rule of absolute liability unless expressly exempted or modified by statute, was stated and implemented in Section 11 of the Public Officers Law, as it read and provided during 1931 through 1933 and applied to the surety bonds here sued on:

> "§11. *Official undertakings.* Every official undertaking, when required by or in pursuance of law to be hereafter executed or filed by any officer, shall be to the effect that he will faithfully discharge the duties of his office and promptly account for and pay over all moneys or property received by him as such officer, in accordance with law, or in default thereof, that the parties executing such undertaking will pay all damages, costs and expenses resulting from such default not exceeding a sum, if any, specified in such undertaking. * * *"

In the present case, the Town Supervisor's undertaking was in almost the precise words of the statutes (R. 36-37); and in *Yawger* v. *American Surety Co., supra,* the New York Court of Appeals expressly sustained the liability of a surety company on a similar obligation for loss of town funds resulting from bank failure.

The decision of the Court below, holding that the Town Board's designation of The Pelham National Bank as one of the three depositaries of Town funds had the effect of terminating or modifying Supervisor McCormick's absolute and continuing liability for any loss of Town funds and relieving McCormick and the Surety Company of all liability and responsibility for the loss of Town funds resulting from the failure and insolvency of The Pelham National Bank is thus directly at variance with the above-cited New York authorities defining the scope of liability of public officers charged with the care and custody of public

funds. Although the Courts of some other states, under differing statutory patterns, have relaxed the absolute liability of public officers for funds kept in a particular depositary designated by some other public officer or body, no authoritative New York case, so far as we can find, has ever done so, whether a particular depositary be designated or whether, as here, the designation is of several from which the public officer may and does make his choice.

In the most recent case of *Bird* v. *McGoldrick* (1938), *supra*, wherein a Clerk of the Municipal Court was held absolutely liable for a loss of public funds through the defalcation of a subordinate who had been appointed by other authority, the New York Court of Appeals declared anew its adherence to the rule of strict liability without qualification. Although Judge Lehman, in his opinion, expressed some hesitancy as to extending the rule to include a loss caused by the failure of such a subordinate to *collect* public moneys, as distinguished from a loss of public moneys *received* by a public officer, and the liability was ultimately predicated upon the Clerk's statutory duty, Judge Lehman expressly stated "that the rule of strict liability for moneys *received* by a public official is in accord with the great weight of authority in this country" and that "this Court has reiterated the rule of a public officer's strict and almost absolute liability for public moneys received by virtue of his office", citing *Yawger* v. *American Surety Co., supra, Village of Bath* v. *McBride, supra, City of New York* v. *Fox*, 232 N. Y. 167. Moreover, Judge Lehman stated unequivocally, as quoted on page 13, *ante*, the rule for Courts to follow, in resisting suggestions for exemptions or exceptions by judicial construction.

Village of Bath v. *McBride, supra*, referred to in the majority Opinion below (R. P. 56) decides nothing to the contrary. In that case, the New York Court of Appeals reversed the decision of the Appellate Division, Fourth

Department (163 App. Div. 714), and held the Village Treasurer liable for the loss of Village funds resulting from the failure of a local bank. Not only did the Court of Appeals find no evidence to support the Appellate Division's finding that the Village Trustees had designated the bank as a depositary of Village funds, but the Court of Appeals went further and said (219 N. Y. at page 97):

> "It seems to have been a case in which the bank itself discharged the duties of village treasurer, and one of its tellers or employees was perhaps put forward to hold the office. The course of business in the bank with reference to the village moneys shows that the defendant McBride held his office more or less as a formality, but though that be so, *the Court cannot exempt him from the responsibility which he thus assumed. The rule of strict liability laid down in Tillinghast* v. *Merrill (supra) is a very important one, and it should not be frittered away in seeking to give relief in hard cases.*" (Italics supplied)

Manifestly, the *dicta* in *City of Newburgh* v. *Dickey*, 164 App. Div. 791, and *People ex rel. Glens Falls Trust Co.* v. *Reoux*, 60 Misc. 139 (aff'd without opinion 128 App. Div. 933), decided by lower Courts, furnish no competent authority for the decision below in this case. Neither of those cases in lower Courts involved the question here at issue. In the *City of Newburgh* case, the question was whether the City Charter empowered the City Council, instead of the City Treasurer, to designate the depositary of City funds; and the Court held that it did. In the *Reoux* case, the question was whether the County Law empowered the County Board of Supervisors, instead of the County Treasurer, to designate the depositary of County funds; and the Court held that it did not. In both cases, the observations made by the lower Courts concerning the scope of liability of the respondent public officials were mere make-weight arguments; and the Courts' reasoning in each instance was

wholly out of line with the rationale of the New York Court of Appeals' decisions hereinabove cited and discussed.

In this connection, it may also be noted that the portion of the opinion of the Appellate Division, Second Department, in the *City of Newburgh* case, which is quoted in the majority Opinion below (R. P. 57), was based on an inclusive footnote contained in *Dillon on Municipal Corporations* (5th Ed. 1911), § 434, which in turn was based upon a *dictum* contained in the early Michigan case of *Perley* v. *Muskegon County*, 32 Mich. 132. Apart from the fact that the *Perley* case did not involve the question of the liability of a public officer for public funds lost through bank failure, it was expressly recognized by the Michigan Court (32 Mich. at page 135) that

> "The position of a public officer is peculiar, and the differences in different systems of statutes show that the responsibility is not by any means uniform * * *."

Having regard for the legislative plan and the statutory method of protection which was available to the Town Supervisor under the Town Law in the instant case, and in view of the New York Court of Appeals' unvarying refusal to create exceptions to the rule of the outright liability of public officials for loss of public funds, and its express admonition that such a change or limitation would be the function of the Legislature, and not of the Courts, we respectfully submit that the decision of the Court below was clearly erroneous and in direct and prejudicial conflict with the applicable State decisions and statutory public policy.

II

The decision of the Circuit Court of Appeals nullifies the express Legislative policy of the New York Town Law designed to assure the safety of Town funds in any and all events

The table of statutes set forth in the Appendix shows conclusively that the fundamental purpose of the New York Legislature, at all times, has been to provide for the complete safety of Town funds in any and all events.

Under the *old* Town Law (L. 1909, Ch. 63, §§ 100, 101), in force when Supervisor McCormick took office, the Town Supervisor and the sureties on his official undertaking were absolutely liable to the Town, for any loss of Town funds, *even* a loss resulting from bank failure; but the Supervisor, in recognition of this latter liability, was authorized to "purchase a surety bond of some solvent surety company, * * *, *securing to such Supervisor the safety of Town funds deposited* by him in any bank or banking institution in this State, and *indemnifying him* against the loss thereof".

Under the *new* Town Law as originally enacted (L. 1932, Ch. 634, §§ 25, 29), effective January 1, 1934, the Town Supervisor and the sureties on his official undertaking were absolutely liable to the Town for any loss of Town funds, except a loss resulting from bank failure; but the Supervisor was required to "purchase at the expense of the Town a surety bond * * *, *securing to the Town the safety of Town funds deposited* by him in or with any bank or trust company in this State, and indemnifying the Town against the loss thereof". After the *new* Town Law became effective on January 1, 1934, the provision of Section 29(6) of the new Town Law requiring the Town Supervisor to purchase a depository bond in favor of the Town was repealed (L. 1934, Ch. 675), in view of the express provision of Sec-

tion 25 of the new Town Law authorizing the Town Board to "require *any Town officer* depositing funds or moneys of the Town *to file a depository bond indemnifying the Town against any loss thereof*".

From this comparison of the reciprocal provisions of the old Town Law and the new Town Law, it will be seen clearly that the decision of the Court below not only disregards the well-recognized rule of statutory construction that "a material change in the phraseology of an act is generally regarded as a legislative construction that the law so amended did not originally embrace the amended provisions" (*Pyrke* v. *Standard Accident Insurance Co.*, 144 Misc. 53, 57; aff'd *sub nom., Baldwin* v. *Standard Accident Insurance Co.*, 237 App. Div. 334, aff'd 262 N. Y. 575), but does violence to the whole Legislative intent and framework of the New York Town Law in force up to and during the time Supervisor McCormick was in office and the loss of funds took place, and completely nullifies the express legislative policy in New York designed to assure the safety of Town funds and monies in any and all events.

III

The decision of the Circuit Court of Appeals destroys vested contract rights and impairs the obligation of the contract represented by the bond sued on

It is manifest that the majority Opinion below, in denying the Town's right to recovery over against the Surety Company on its third-party complaint, gave essentially a *retroactive effect* to the later amendments of the New York Town Law, and thereby destroyed the vested rights of the Town against the Surety Company on Supervisor McCormick's official undertaking conditioned to "pay over and account for all funds coming into his hands * * * by virtue of his said office of Supervisor" (R. 36-37).

In executing Supervisor McCormick's official undertaking as surety, the Surety Company knew and was fully aware of the Town Supervisor's absolute liability for the loss of Town funds, including a loss of Town funds resulting from bank failure. That is why the condition of its bond was not qualified, as in the case of *City of Scranton* v. *Aetna Casualty and Surety Co.*, 11 F. Supp. 986, aff'd 94 F. (2d) 941, cited in the opinion of the District Court below (R. 141); that is why the Surety Company asked Supervisor McCormick to enter into the Escrow Agreement with The Pelham National Bank (R. 73); and that is why the Surety Company should now be held liable to the Town for the present loss pursuant to the express terms of its surety contract.

The obligations of Supervisor McCormick and the Surety Company, as surety on his official undertaking, are properly to be determined "by the special contract evidenced by his bond conditioned as above stated" (*Smythe* v. *United States*, 188 U. S. 156); and, as stated by Judge Cardozo in *Yawger* v. *American Surety Co., supra*, a public officer charged with the care and custody of public funds does not "pay over and account" for such funds by pointing to a "fictitious balance" in an insolvent bank (212 N. Y. at page 298).

In Conclusion

In conclusion, therefore, it is respectfully submitted that the petition of the Town of Pelham for a writ of certiorari herein should, in all respects, be granted.

William L. Ransom
Counsel for Petitioner

TABLE OF NEW YORK STATUTES SHOWING LEGISLATIVE ACTION AS TO THE LIABILITY OF A TOWN SUPERVISOR AND ASSURING THE PROTECTION OF THE FUNDS OF THE TOWN

Years 1916-1933

PUBLIC OFFICERS LAW

"§ 11. *Official undertakings. Every official undertaking,* when required by or in pursuance of law to be hereafter executed or filed by any officer, *shall be to the effect that he will* faithfully discharge the duties of his office and *promptly account for and pay over all moneys or property received by him as such officer, in accordance with law, or in default thereof, that the parties executing such undertaking will pay all damages, costs and expenses resulting from such default, not exceeding a sum, if any, specified in such undertaking.* * * *" (L. 1909, Chap. 51, as amended).

OLD TOWN LAW

Years 1934-36

Public Officers Law, Section 11, continued in effect unchanged.

NEW TOWN LAW

Effective January 1, 1934, but enacted by L. 1932, Chap. 634, the legislative plan and the provisions contained up to that time in Sections 100, 101, and 149-c of the Town Law were amended generally; and the Supervisor was for the first time expressly relieved from liability for moneys deposited in designated banks if he followed the required procedure for protecting the Town against loss. The new provisions were in New Town Law, Sections 25 and 29, *not effective until January 1, 1934:*

Year 1937

Public Officers Law, Section 11, continued in effect unchanged.

New Town Law, Sections 25 and 29, with amendments shown in the previous column, remained in force. But in 1937, an additional sentence was added (L. 1937, Chap. 468) to Section 64(1) of the New Town Law, providing that

"All acts done prior to the effective date of this Section which would have been valid hereunder are hereby validated."

Years 1916-1933

"§ 100. *Supervisor's undertaking.*—Every Supervisor hereafter elected or appointed shall, within thirty days after entering upon his office, make and deliver to the town clerk of the Town his undertaking, with such sureties as the Town Board shall prescribe, to the effect that he will well and faithfully discharge his official duties as such Supervisor, and *that he will well and truly keep, pay over and account for all moneys and property,* including the local school fund, if any, *belonging to his Town and coming into his hands as such Supervisor;* * * *" (L. 1909, Chap. 63).

Years 1934-36

"§ 25. *Oaths of office and undertakings.* * * * *Each Supervisor,* town councilman, town clerk, collector, receiver of taxes and assessments, justice of the peace, constable, town superintendent of highways, and such other officers and employees as the Town Board may require, before entering upon the duties of his office, *shall execute and file* in the office of the clerk of the county in which the Town is located, *an official undertaking, conditioned for the faithful performance of his duties,* in such form, in such sum and with such sureties as the Town Board shall direct and approve. *The undertaking of the Supervisor shall be further conditioned that he will well and truly keep, pay over and account for all moneys* and property, including the local school fund, if any, belonging to his Town and coming into his hands as such Supervisor. The Town Board at any time may require any such officer or employee to file a new official undertaking for such sum and with such sureties as the board shall approve. *In addition the Town Board may require any Town officer depositing funds or moneys of the Town to file a depository bond indemnifying the Town against any loss thereof.* * * *"

Year 1937

bond indemnifying the Town against any loss thereof. * * *"*

Years 1916-1933

"§ 149-c. *Duties of Supervisor.* The Supervisor of any such Town shall demand, collect, receive and *have the care and custody of* and shall disburse all moneys belonging to or due the Town from every source, except as otherwise provided by law. *All moneys of the Town* received by the Supervisor shall be deposited by him in such bank, banks or trust companies *as shall be designated by the Town Board for such purpose.* * * *"* (L. 1916, Chap. 396, Article VI-A, Town Law, providing a budget and fiscal system for certain classes of Towns; applicable to Towns in Westchester County March 12, 1931, pursuant to L. 1931, Chap. 92).

NOTE: When the budget plan for Towns was enacted in 1916, including Section 149-c, the "saving clause" (Section 149-e) disclaimed intent to repeal or modify any existing provisions of the Town Law not inconsistent with the budget plan. When Article VI-A was amended in 1931 so as to make the budget plan applicable to Towns in Westchester County, both the title of the Act and the "saving clause" (L. 1931, Chap. 92, Section 149-f) again disclaimed and precluded any other intent.

Years 1934-36

"§ 29. *Powers and duties of Supervisor.* The Supervisor of each Town

1. Shall act as treasurer thereof and shall demand, collect, receive and have the care and custody of moneys belonging to or due the Town from every source, except as otherwise provided by law.

2. Within ten days after their receipt, shall deposit in his name as Supervisor, all such moneys in or with such banks or trust companies of this State, as the Town Board may designate, and agree with such banks and trust companies upon the rate of interest to be paid upon deposits, which interest shall accrue to the fund or account earning the same. *Such designation and deposit of the moneys shall not release the Supervisor nor his sureties from any liability in relation to such moneys, nor in any manner affect such liability except, however, that the default by any such depositary shall not be deemed the default of the Supervisor and his sureties shall not be liable to the Town for any loss due to the default of such depositary.* * * *

Year 1937

Years 1916-1933

"§ 101. *Surety bond indemnifying Supervisor against loss of deposits.*—The Supervisor of any Town *may* purchase a surety bond of some solvent surety company, authorized to do business in the State of New York, *securing to such Supervisor the safety of Town funds deposited* by him in any bank or banking institution in this State, and *indemnifying him* against the loss thereof through the failure or insolvency of such bank or banking institution, and the cost of such bond shall be a Town charge and shall be audited and paid in the same manner as other Town charges" (L. 1909, Chap. 63).

Years 1934-36

6. *Shall purchase* at the expense of the Town a surety bond of a surety company, authorized to do business in the State of New York, *securing to the Town the safety of Town funds deposited* by him in or with any bank or trust company in this State, and indemnifying the Town against the loss thereof, or, whenever authorized and directed by the Town Board, said Supervisor may accept from any bank or trust company in this State in which Town funds are on deposit, the bonds or certificates of the United States, of the State of New York or of any County, Town, City, Village or School District of the State of New York *as security for the funds of the Town so deposited* but such bonds or certificates shall be subject to the approval of the Town Board and shall be deposited in such place and held under such conditions as the Town Board may determine."

Note: Before their taking effect on January 1, 1934, Section 25 of the New Town Law was amended (L. 1933, Chap. 751) in a respect not material here, and Section 29, sub-division 2, of the New Town Law was amended so as expressly to relieve the Supervisor of liability for the loss of deposited funds through default of a bank, etc., "in the absence of

Year 1937

to relieve the Supervisor of liability for the loss of deposited funds through default of a bank, etc., "in the absence of

Years 1916-1933	*Years 1934-36*	*Year 1937*
	gross negligence or fraud" on the part of the Supervisor (L. 1933, Chap. 751). The protection of the Town pursuant to Section 29, sub-division 6, was expressly retained.	
	After the taking effect of the New Town Law and the new legislative law plan on January 1, 1934, Section 29, sub-division 2, was further amended and Section 29, sub-division 6, was repealed, in view of the provision of Section 25 authorizing the Town Board to require a *Supervisor* to furnish also a depository bond to protect the Town against loss of deposited funds (L. 1934, Chap. 675). After requiring the deposit of Town funds in banks to be designated by the Town Board, the amendment provided *in express terms* (Section 29(2)) that	
	"Such designation and deposit of the moneys shall release the Supervisor and his sureties from any liability for loss of such moneys by reason of the default or insolvency of any such depositary."	